IN THE

# Supreme Court of the United States

October Term, 1953
No. 449.

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

MEAD GILMAN, JR.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## BRIEF FOR RESPONDENT MEAD GILMAN, JR.

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### Question Presented.

The only question presented is whether the United States has a right to indemnity from an employee whose negligence imposes liability upon the United States by virtue of the Federal Tort Claims Act.

### Statutes Involved.

The pertinent portions of the Act read as follows:

Title 28 U. S. C. A., Sec. 1346:

"Sec. 1346. *United States as Defendant.*

* * * * * * * *

"(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the

District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28 U. S. C. A.:

"Sec. 2672. *Administrative Adjustment of Claims of $1,000 or Less.*

"The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and

conclusive on all officers of the government, except when procured by means of fraud.

"Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

"The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Title 28 U. S. C. A.:

"Sec. 2674. *Liability of United States.*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Title 28 U. S. C. A.:

"Sec. 2676. *Judgment as Bar.*

"Judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

**Statement.**

Darnell was injured by the negligence of the respondent, Mead Gilman, Jr., an employee of the United States, while driving his employer's automobile. Darnell sued the government under the Federal Tort Claims Act and the government filed a third party complaint for indemnification against respondent, Gilman. The District Court awarded $5500 to Darnell against the United States, and on the third party complaint gave judgment in like amount for the United States against the respondent.

Darnell appealed, contending (1) that it was the intention of Congress that responsibility for negligent acts of employees of the United States be assumed by the government alone. In support of this contention, respondent cited 28 U. S. C. A. 2d 2676 of the Federal Tort Claims Act, providing that a judgment against the government should constitute a bar to any further action by claimant against the employee of the government and setting forth other indicia of such statutory intent; and (2) that within the realm of government fiscal policy the courts will not grant the United States a right of recovery where Congress in legislating upon the subject has withheld such right. As indicative of the judicial position, respondent cited *United States v. Standard Oil Co.*, 332 U. S. 301,

wherein the government in a common law action for indemnity was denied recovery for loss of the services of a soldier injured by the negligent act of a third party in the absence of a statute bestowing this right.

The Court of Appeals reversed the lower court without the necessity of determining whether Section 2676 of the Tort Claims Act directly released the government's claim against its employee, stating:

> "It is thus apparent that we do not deal with any question as to whether Section 2676 releases the government's claim against its employee."
> 260 F. 2d 846, 848.

The court also held that it was unnecessary to determine whether the action was barred by the rule of the *Standard Oil* case.

The court did hold that since the action of the government was quasi-contractual in nature by way of indemnity for payment of that which the employee should have paid, no cause of action ever arose in favor of the government, since by virtue of Section 2676 of the Federal Tort Claims Act the moment judgment was entered against the government the employee was no longer primarily answerable to the claimant nor was he answerable at all, and could not be unjustly enriched by any payment to the injured party.

Judge Harrison, in dissenting from the opinion of the majority, relied upon *U. S. v. Yellow Cab Co.*, 340 U. S. 543, holding the government entitled generally to contribution from joint tort feasors. This latter decision did not have before it, nor had it considered, the problem of a joint tort feasor who is an employee of the government and the problems therein arising under 2676 of

the Federal Tort Claims Act. Further, the dissenting opinion was apprehensive of collusion by employees of the government against the government to advance claims of parties whom the employees have injured. This opinion failed to mention the restraining influence of the laws of perjury and the disciplinary power of departmental heads, as well as the desire of an employee to maintain his record with his employer, and his natural desire to justify his own conduct.

**The Decision of the Court of Appeals Was Proper.**

The judgment of the Court of Appeals should be affirmed for the following reasons:

I. CONGRESS DID NOT INTEND THAT THE UNITED STATES SHOULD BE INDEMNIFIED FROM A GOVERNMENT EMPLOYEE FOR WHOSE NEGLIGENCE THE GOVERNMENT BECOMES LIABLE UNDER THE TORT CLAIMS ACT.

A. *LEGISLATIVE HISTORY SUPPORTS THE DECISION OF THE COURT OF APPEALS.*

B. *SOUND PRINCIPLES OF JUDICIAL CONSTRUCTION SUPPORT THE DECISION OF THE COURT OF APPEALS.*

II. SECTION 2676 OF THE ACT PREVENTS A CAUSE OF ACTION FOR INDEMNIFICATION FROM ARISING IN THE GOVERNMENT'S FAVOR AGAINST AN EMPLOYEE.

A. *BY RELEASING THE EMPLOYEE UPON JUDGMENT AGAINST THE GOVERNMENT RATHER THAN UPON SATISFACTION THEREOF, THE UNITED STATES BECAME A VOLUNTEER WHO OFFICIOUSLY CONFERRED A BENEFIT UPON THE EMPLOYEE AND IS THEREFORE NOT ENTITLED TO RESTITUTION.*

B. *UPON RENDITION OF JUDGMENT AGAINST THE UNITED STATES THE EMPLOYEE BY OPERATION OF LAW HAS BEEN DISCHARGED FROM OBLIGATION TO ANYONE AND THERE REMAINS NO QUASI CONTRACTUAL BASIS FOR INDEMNITY.*

C. *THE GOVERNMENT, BY STATUTE, HAS PLACED ITSELF IN A POSITION DIFFERENT FROM THAT OF A PRIVATE EMPLOYER AND CONTRARY TO THE PRINCIPLES OF QUASI CONTRACT.*

## ARGUMENT.

### I.

### Congress Did Not Intend That the United States Should Be Indemnified From a Government Employee for Whose Negligence the Government Becomes Liable Under the Tort Claims Act.

#### A. Legislative History Supports the Decision of the Court of Appeals.

Prior to the enactment of the Federal Tort Claims Act the government was immune from suit by injured claimants. Any restitution resulted from relief afforded through private bills, which, it is conceded, partook of a legislative gratuity founded on a moral obligation not creating any right of restitution from the employee. (Footnote 10, p. 18, App. Br; Restatement, Restitution, Sec. 112.) It was the alarming increase in private bills which brought about enactment of the Tort Claims Act. Thus, historically, there is no foundation in fact or law for assuming that Congress ever intended to recoup in any manner from the employees. In fact, quite the contrary. On many occasions, in deserving cases, Congress actually passed bills to meet the obligations of an employee who was rendered liable to a third party by virtue of the former's use of government property. The attitude of the government was decidedly benevolent in nature and there is every indication that the legislators intended to continue such a policy when the Federal Tort Claims Act was enacted.

Even after passage of the Tort Claims Act, private bill No. 820, 82nd Congress, afforded such special relief to a mail truck operator who had been held liable to a

third party for negligence while acting within the course and scope of his employment by the United States.

In 1941 prior to the passage of the Act, an opinion of the Attorney General directed to the Secretary of Agriculture disclaimed any right to indemnity on behalf of the United States. From the opinion, in 40 Ops. Atty. Gen. p. 38 (1941) we set forth the last three paragraphs expressing the general attitude taken by the government, to the effect that the government does not assume any right to reimburse itself from an erring employee, and would resort merely to disciplinary action:

> "Numerous suits were filed by officers and employees of the Government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. Notwithstanding the view stated by the Solicitor in Dennis v. United States, the Congress repeatedly came to the relief of the erring officers and employees. Thus, in Murray v. Schooner Charming Betsy, 2 Cranch 64, 124. The Supreme Court held Captain Murray of the U. S. Frigate Constitution personally liable for a tortious seizure, but the Congress made provision for his relief by the Act of January 31, 1805, see 12 Six Stst. 56. Some of the suits were undoubtedly prosecuted in anticipation of such action by the Congress. In other cases private acts appropriated money for the direct relief of the injured private persons.
>
> "Since that time the Congress has by general legislation progressively assumed liability to persons sustaining injury through negligence of officers and employees of the Government and in doing so has not made provisions for the assertions of claims by the United States against the officers and employees

causing the damage. A comprehensive review of the course of such legislation (including private acts) in collision cases appears in the Government's brief on reargument in Boston Sand & Gravel Company v. United States (No. 15, Oct. Term 1928) 278 U. S. 41.

"For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the Act of December 28, 1922. Of course, the employee may be subject to suitable disciplinary action, including dismissal, if warranted."

Section 2672 of 28 U. S. C. A., with respect to administrative settlements under the Act with a claim of $1000 or less, provides that:

"The acceptance by the claimant of any such award, compromise or settlement, shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Senate Report 1196, 77th Cong., 2d Sess., p. 5, dealing with the corresponding provisions of what is now Section 2672 of Title 28, *supra,* contains the following statement:

" 'It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.' "

This report was made in 1942, but *Dalehite v. United States,* 346 U. S. 15, makes it plain that Congress in passing the Federal Tort Claims Act in 1946 relied upon the 1942 reports and testimony, and the court in this latter case quotes extensively from them. Reference is herein made to the testimony of the then Assistant Attorney Shea:

> "The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfied that claim, that is the end of the claim against anybody?
>
> "Mr. Shea. That is right.
>
> "The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?
>
> "Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.
>
> "Mr. McLaughlin. No right of *subrogation* is set up?
>
> "Mr. Shea. Not against the employee." (Emphasis added.) (Hearings on H. R. 5373 and H. R. 6463 Before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., pp. 9-10; see also, S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.)

This court has recognized that the shape of the Tort Claims Act was largely determined during its consideration by the 77th Congress, Second Session, (*Dalehite v. United States,* 346 U. S. 15, 24-30).

In testifying before the House Committee on this very aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the government would have no right to indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. (Hearings before House Committee on Judiciary on H. R. 5373 and 6463, 77th Cong., 2d Sess., p. 10.)

Irving Gottlieb, Attorney, Tort Claim Section, Department of Justice, discussed the Government's right to indemnity under the Act in an article appearing in 9 Fed. Bar Journal 391, in the following language.

> "It should be pointed out that in one of the early and well established fields where indemnity has been historically operative, that is, in the master-servant relationship, Federal Tort Claims Act in its legislative history contemplates no action by the United States against its delinquent employees, other than disciplinary proceedings. Section 410(b) of the Act provides for a clear assumption of liability on the part of the United States for the delicts of its agents acting within the scope of their authority. Notwithstanding the foregoing, the Statute on its face being silent on the rights of the United States over against its employees and there being no prohibition of the common law right inherent in the master-servant relationship, the possibility of action over by the United States, where the situation is one calling for more than mere disciplinary action still remains."

Mr. Gottlieb reviews the legislative debates made prior to the passage of the Act when private bills were being passed to relieve the employee from liability and concludes that the debates contemplated no right to indemnity

in favor of the United States. Mr. Gottlieb also found that these same debates and the reasoning therefor were adopted by Congress when the Act was passed. That is, the Government was content to have the right to take appropriate disciplinary action against its employee and did not undertake to outline governmental fiscal policies.

The government is unable to point out any reports or testimony before Committees of Congress prior to enactment of the Tort Claims Act wherein there was evidenced any intention or opinion that expenses incurred by the government under the Act should be recouped from employees. As above set forth in this brief, all of the intentions and expressions were to the contrary. This should give compelling force to the position of the respondent in this case.

Under Section 2672, Title 28 U. S. C. A., dealing with administrative adjustments of claims which is a subsestantial and integral portion of the statute, the intention of Congress was to confer a benefit upon the employee and not to employ legal sanctions through the courts. The same reasoning is applicable to Section 2676 of the Act making a judgment against the United States a complete bar to any action against the employee.

Appellant's brief, at page 32, recognizes that in the case of a private employer and employee it is the *satisfaction,* rather than the *rendition,* of the judgment against the employer that absolves the employee from further liability to the third party. (Citing: *Eberle v. Sinclair Prairie Oil Co.,* 120 F. 2d 746 (C. A. 10); *Royal Indemnity Co. v. Olmstead,* 193 F. 2d 451 (C. A. 9); Restatement, *Judgments,* Sec. 95; *Lovejoy v. Murrary,* 3 Wall. 1, 17; *Cf. Anderson v. Abbott,* 321 U. S. 349, 355; *Sessions v. Johnson,* 95 U. S. 347, 349.)

Here the legislative body has conferred the benefit by releasing the employee immediately upon entry of the judgment without reference to satisfaction as would otherwise be the case. (*McVeigh v. McGurren,* 117 F. 2d 672; *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 129; Restatement, *Judgments* 96 (2); 1 Freeman, *Judgments,* 469, p. 1032.)

At common law where liability is claimed arising out of an accident caused by alleged negligence of an agent, a judgment *in favor of* the principal is *res judicata* or conclusive as to further action against the agent (App. Br. p. 37). Thus, where judgment favors the government, Section 2676 grants no benefit not existing under the common law. But the Act does confer a benefit when judgment is in favor of the third party against the government, and does so by releasing the employee upon rendition of judgment instead of requiring actual satisfaction as would otherwise be the case.

Therefore, it is all the more apparent that it was in a case such as the one at bar where judgment is rendered against the government that Congress intended to protect the employee. All of the above demonstrates an obvious intention on the part of Congress to benefit the employee, and nowhere is there anything that would justify an inference that Congress meant this Act to be used against the employee whom it was trying to protect.

Respondent's position is particularly cogent if we accept the argument of petitioner at page 35 of its brief wherein Mr. Shea, in the Committee hearing prior to enactment of the statute, expresses the desire of the government to maintain the morale of the government employees who are involved in litigation.

If the government is willing to go out of its way to supply legal counsel to every individual government employee who gets involved in an accident using government property solely to keep up the morale of the employees, it must go without saying that Congress, knowing of this through Mr. Shea, intended to boost the morale of the employees by barring further action against them by anyone when a judgment was entered against the government. Congress enacted Section 2676 to protect the employees. It certainly never intended that the Act should be regarded as enabling authority to prosecute government employees that Congress had previously, in deserving cases, seen fit to reimburse. It is particularly ironic that this very section barring suits against the employee upon entry of judgment against the United States is now being used by the government to prosecute an action for indemnification immediately upon entry of the judgment, whereas, even a private employer who has demonstrated no interest in protecting his employee could not seek indemnity until actual satisfaction of the judgment had been made.

In this connection it must be pointed out that if the morale of government employees is to be considered as a basis for the decision in this case, the government's position here must fall, for if the employee is not insured and the government is allowed to press this action for indemnity, the effect on the employee's finances would seriously impair his morale. Whereas, if the government pursues this course of action in such a manner as to require the employee to become insured in contradiction to the true purpose of the Act, a penalty is inflicted upon the government employee who must assume the cost of premiums as a burden to his employment. The additional

cost to the employee must necessarily have a corresponding adverse influence upon his morale. Thus the interpretation demanded by the government contravenes the purpose of Congress in conferring benefits upon the employees.

**B. Sound Principles of Judicial Construction Support the Decision of the Court of Appeals.**

In *United States v. Standard Oil Company,* 332 U. S. 301, a soldier was injured by the negligence of defendant's driver. The United States bore the expenses of hospitalization and his army pay during his disability. Suit was brought by the United States to recover its expenditures. Ordinarily under state law a right of action would have accrued to a master for similar injuries to a servant. This court refused to concede such right to the government, stating, among other things, that the subject concerned the "purse strings" of the government and that Congress, had it so desired, could have taken positive steps to declare its wishes on a matter so intimately affecting fiscal affairs of the government. Admittedly, there were other grounds, which petitioner has mentioned in its brief, for the court reaching the decision it did, but there is a similarity between the *Standard Oil* case and the one at bar as they affect fiscal policy of the government which justifies application of the same rationale to the present case.

In this connection Congress, in enacting the Federal Workmen's Compensation Act, U. S. C. Title 5, Section 776, specifically provided that the United States is subrogated to any rights its employees may have against third parties responsible for expenses of the United States under the Act.

Similarly, it should be noted that when the State of California by Section 400 of the Vehicle Code waived its sovereign immunity from claims resulting from negligent operation of vehicles by State employees, specific provision was made for subrogation of the State against the employee as follows:

> "The state * * * is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent or employee * * * when acting within the scope of his office, agency or employment; and such person may sue the state * * * in any court of competent jurisdiction in this state in the manner directed by law * * *. In every case where recovery is had under the provisions of this section against the state * * * then the state * * * shall be subrogated to all of the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and costs recovered against the state * * * together with costs therein."

It is only reasonable to assume and decide that had Congress wished to have the close relationship between the government and its employees disturbed by litigation between them, then certainly a specific provision for such drastic action would have been contained in the enactment. This is particularly so, in view of the benevolent attitude of the government towards its employees prior to this statute.

## II.

**Section 2676 of the Act Prevents a Cause of Action for Indemnification From Arising in the Government's Favor Against an Employee.**

Since the government is totally lacking in statutory authority to proceed against the employee for indemnification, it pleads that it has a right to be treated as an ordinary private employer under the quasi contractual theory of common law. At pages 12-13 of its brief it states:

> "The court of appeals correctly concluded that federal and not state law controlled, that the action of indemnity was quasi contractual in theory, and that it was based upon the concept of unjust enrichment resulting from the benefit conferred upon the employee by the employer's discharge of an obligation which, in equity and good conscience the employee, the one who was actually guilty of the negligence, ought to have paid. * * * In seeking restitution from its agent, the United States asks only for nondiscriminatory application to it, as an employer, of the historic rule of the common law which recognizes the employer's rights over against the employee."

The government also concedes that in the case of a private employer, the employee is released only upon satisfaction of the judgment against his employer, whereas Section 2676 of the Tort Claims Act releases the employee upon rendition of the judgment rather than upon its satisfaction. At page 32 of its brief the government states:

> "The effect of the Section, for the claimant, is to make the judgment, rather than its satisfaction (as in the case of a private employer), a conclusive bar to the claimant's right against the employee."

Therefore, by its own admission, the government's case must stand or fall on its ability to qualify for indemnity under the rules of quasi contract applicable to a private employer. Its case falls for the following reasons:

**A. By Releasing the Employee Upon Judgment Against the Government Rather Than Upon Satisfaction Thereof, the United States Became a Volunteer Who Officiously Conferred a Benefit Upon the Employee and Is Therefore Not Entitled to Restitution.**

The cases are legion which hold that one who without mistake, coercion or request satisfies another's obligation is not entitled to restitution from the other. (Restatement, Restitution, Sections 2, 112-117; *Homestead Company v. Valley Railroad,* 84 U. S. 153; *Thompson v Deal,* 92 F. 2d 478.) At page 39 of its brief the government admits that Section 2676 confers a benefit upon the employee by extinguishing his liability upon rendition of judgment, whereas otherwise he would have to await satisfaction thereof and pending satisfaction could be subjected to a harassing suit by the same claimant.

Therefore, under 2676, the government without mistake, coercion or request has advanced the benefit to the employee of satisfying the claim against him upon rendition of judgment against the government rather than by later satisfaction thereof. By this benefit advanced the government has placed itself in the position of a volunteer under the common law and has no right to indemnity.

**B. Upon Rendition of Judgment Against the United States the Employee by Operation of Law Has Been Discharged From Obligation to Anyone and There Remains No Quasi Contractual Basis for Indemnity.**

> "A quasi contractual obligation is one that is created by the law for reasons of justice without any expression of assent and sometimes even against a clear expression of dissent. * * * It must be admitted, or indeed asserted, that considerations of equity and morality play a large part in the process of finding an inference of fact as well as constructing a quasi contract without any such inference at all. *The exact terms of the promise that is 'implied' must frequently be determined by what equity and morality appear to require after the parties have come into conflict.*" (Emphasis ours.)
>
> *1 Corbin on Contracts,* Sec. 19 (1950).

A review of legislative history and of Congressional thinking prior to and even after enactment of the Tort Claims Act clearly demonstrates that Congress, upon submitting the United States to liability under the Act, contemplated no indemnification of the government by its employees. The Act maintains a silence on the subject except to grant the employee a benefit under Section 2676, which, in the absence of a specific statutory declaration to the contrary, is inconsistent with any action by the government against its employee for indemnity. The wording of the statute leads to but one conclusion, namely, that Congress intended to confer all benefits reasonably inferrable from the language used.

Applying the considerations of equity and morality which govern the creation of quasi contractual obligations the effect of 2676 is to protect the employee. The third party in voluntarily causing a judgment to be en-

tered in his suit against the United States has released and discharged the employee's obligation to him by operation of law in such manner that no implied promise of the employee to indemnify the government comes into being.

**C. The Government, by Statute, Has Placed Itself in a Position Different From That of a Private Employer and Contrary to the Principles of Quasi Contract.**

Ignoring the fact that the government is a volunteer without rights and that the injured party by operation of law has wholly released and discharged the employee from obligation to anyone, there are further most compelling reasons why the government cannot prevail on the theory it is advancing. Even if the employee's release by judgment alone, as distinguished from satisfaction thereof, did not label the government as a volunteer and even if the initial obligation of the employee had not been so released as to preclude indemnification, still the government's demand must be refused unless we consider it above the law, which is certainly not the case. There are two good reasons why it may not presume to the position of a private employer for the purpose of securing a remedy under quasi contract at common law to which it is not entitled.

In the first place, section 2676 acts to release the claim of the third party against the employee immediately upon the rendition of judgment against the government. It is conceded by appellant that this does not occur in cases involving a private employer at common law until the employer has satisfied the judgment. Therefore, the government by this mechanism has placed itself in a position antithetic to that of a private employer and may not now

aim assimilation solely to obtain a remedy which it has ailed to seek by proper methods.

Secondly, the position of the government at the time udgment is rendered against it is totally different from hat of a private employer under the law at a similar mo- ent. For upon judgment against a private employer here exists a remedy by legal process to compel satisfac- on from the assets of the judgment debtor. Certainly he government does not maintain that it is subject to the ame legal compulsion after judgment as a private em- loyer.

Therefore, by what right does it demand to be placed n the position of a private employer? How clearly it ould violate the quasi-contractual considerations of quity and morality to allow the United States to assert private employer's right to indemnity merely upon ren- ition of judgment against the government. The judg- ent debtor has no legal method of enforcing his judg- ent comparable to that afforded against a private em- loyer, nor has the government made any legal con- ession comparable to that required of a private employer efore bringing suit. One cannot, in good conscience, lay laim to the benefits of another's position under the law, he burdens of which he is unable or unwilling to assume.

## Conclusion.

It is respectfully submitted that the position of the etitioner before this court is untenable and the judgment f the court of appeals must be affirmed.

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